

**No. PD-0703-16**

In the Court of Criminal Appeals of Texas  
At Austin

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◆  
**No. 14-15-00371-CR**

In the Court of Appeals  
For the Fourteenth District of Texas  
At Houston

◆  
**No. 673236**

In the 339<sup>th</sup> District Court  
Of Harris County, Texas

◆  
**Stephen Henry Hopper**  
*Appellant*

v.

**The State of Texas**  
*Appellee*

◆  
**State's Brief on the Merits Regarding  
State's Cross-Petition for Discretionary Review**

◆  
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**Maria Jackson**, Presiding judge

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## **Statement of the Case**

The appellant was indicted for aggravated sexual assault in 1993. (CR 9). When the case came to trial in 2013, the appellant filed a motion to dismiss for lack of a speedy trial; the trial court denied that motion. (CR 100). The appellant pled guilty as part of a plea agreement. (CR 57, 58). In accord with that agreement, the trial court assessed punishment at 30 years' confinement. (CR 58). The trial court certified that, while this was a plea bargain case, matters were raised by written motion filed and ruled on before trial and the defendant had the right to appeal those matters. (CR 55). The appellant filed a timely notice of appeal. (CR 61).

On direct appeal, the Fourteenth Court of Appeals affirmed the trial court's judgment. *Hopper v. State*, 495 S.W.3d 468 (Tex. App.—Houston [14th Dist.] 2016, pet. granted). This Court granted the appellant's petition for discretionary review, as well as the State's cross-petition.

## **Statement of Facts**

The appellant raped and sodomized a masseuse at knife point in August, 1993. (CR 6-7). Three months later he was indicted. (CR 9). It seems that shortly after his offense the appellant left Texas, as he was

arrested in California and extradited to Nebraska before the end of the year. (CR 29). In 1995, the appellant was tried and convicted of sexual assault in a Nebraska court and sentenced to 50 years' confinement. (CR 29).

A week after the appellant began serving his Nebraska sentence, the Harris County District Attorney's Office filed a detainer on him regarding the 1993 indictment. (CR 30; State's Ex. 1). The appellant signed the detainer a couple of weeks later on May 5, 1995, acknowledging he had been advised of the pending indictment and of his right to request a trial. (State's Ex. 1).

The appellant did not request a trial, and there is nothing in the record indicating any action on this case for the next eighteen years. In late 2012, the Harris County District Attorney's Office began researching this case. (CR 30). After concluding that the complaining witness was still alive and willing to testify, on September 4, 2013 the State sent paperwork to the appellant again asking if he wanted to have a trial on this pending indictment. (3 RR 10-12, 35) The appellant declined to sign the paperwork. (State's Ex. 1). The State then filed its own detainer request for extradition so that the appellant could be tried. (State's Exs. 9, 11). These proceedings ensued.

After he arrived in Texas, the appellant filed a motion to dismiss based on an alleged violation of his Sixth Amendment right to a speedy trial; this seems to have been his first invocation of that right since the charges were filed. (CR 23-25). The trial court held a hearing on this motion, during which it heard testimony and admitted evidence regarding the nature of the delay in the case. The State argued that because the appellant knew about these charges for twenty years and had never requested a trial, his right to a speedy trial was not violated: “That tells us what his true desire here is, is he wants the case dismissed. He does not desire a speedy disposition of his trial.” (3 RR 40). The appellant argued that the State had “constitutional duties” to bring him to trial earlier, and thus the delay was all the State’s fault. (3 RR 41). The appellant argued that he was harmed by the length of the delay, as well as by the fact that several pieces of physical evidence seem to have gone missing. (3 RR 42).

The trial court recessed without ruling, but seems to have denied the motion a few days later. (CR 100). After several resets at the defense’s request, totaling nine additional months of delay, the appellant pled guilty in exchange for an agreed sentence of 30 years’ confinement. (CR 47-57, 102-03).

### **Question Presented**

If the State files a detainer under the Interstate Agreement on Detainers Act, but neither the defendant nor the State exercise their option to force a trial in an expeditious manner, does the resulting period of delay count against the State for purposes of a speedy-trial analysis when the case finally goes to trial?

### **Summary of the Argument**

For 18 years, between the filing of the detainer and when the State finally exercised its option to force a trial, both the State and the appellant had the same power to force a trial. When the State finally did force the appellant to go to trial, he filed a motion to dismiss based on a violation of his right to a speedy trial. Though the Fourteenth Court held that the appellant's right to a speedy trial had not been violated, for purposes of the *Barker* analysis it counted the entire period of delay against the State.

The State asks this Court to hold that once the prosecution files a detainer on a defendant confined in another state and makes the defendant aware of his right to demand a trial, any period during which neither side exercises its option to force a trial is akin to an agreed reset

and does not count against the prosecution for purposes of a speedy-trial analysis.

### **Argument**

**Because the appellant and the State were equally culpable for the delay, the delay should not weigh against the State but should be treated as a neutral factor akin to an agreed continuance.**

This case involves the intersection of the Sixth Amendment right to a speedy trial and the Interstate Agreement on Detainers Act (IADA). The State will begin its argument by discussing those two areas of the law. The State will then discuss the Fourteenth Court's opinion, with particular focus on its handling of the second *Barker* factor. As this is a matter of first impression in Texas, the State will discuss the non-Texas cases that have ruled on this question. Finally, the State will argue that its position is more consistent with the policies and principles behind Sixth Amendment case law than is the Fourteenth Court's holding.

## I. Legal Background

### A. The Sixth Amendment guarantees defendants a right to a speedy trial, but it does not reward those who, through inaction and acquiescence, demonstrate that they do not want a speedy trial.

The Sixth Amendment to the federal constitution provides that defendants “shall enjoy the right to a speedy ... trial.” U.S. CONST. amend. VI. This right, though, is a difficult one to assess because, among other reasons, it is often the case that a criminal defendant would prefer not to go to trial, or at least to have his trial delayed. *Barker v. Wingo*, 407 U.S. 514, 520-23 (1972). In an effort to vindicate defendants’ rights without allowing them to easily game the system, the Supreme Court in *Barker* established a now-familiar four-part test for assessing whether the pre-trial delay in a particular case has violated the Sixth Amendment’s guarantee. *See Id.* at 530-32. In short, the four factors are: 1) whether the delay was long enough to trigger an inquiry; 2) what caused the delay; 3) whether the defendant timely asserted his right to a speedy trial; and 4) what harm was caused by the delay.<sup>1</sup> *Ibid.*

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<sup>1</sup> Though the application of these exact four factors has become rote habit in speedy-trial cases, *Barker* emphasized that “these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.” *Barker*, 407 U.S. at 533. In its most recent application of *Barker*, the Supreme Court cited this particular language before factoring in the peculiar nature of the defendant’s role in causing the delay in that case. *See Vermont v. Brillon*, 556 U.S. 81, 93 (2009).

The second *Barker* factor — the cause of the delay — has become a two-part inquiry. First, was the defendant or the State “more to blame” for the delay? *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Vermont v. Brillon*, 556 U.S. 81, 90 (2009). If the delay was caused by the defendant, then that time will weigh against the defendant’s speedy trial claim. *Barker*, 407 U.S. at 529 (“if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine.”). This Court has held that this is true whether the delay is attributable to the defendant “in whole or in part.” *State v. Munoz*, 991 S.W.2d 818, 822 (Tex. Crim. App. 1999).

If the delay is caused by the prosecution, courts will give it different weights depending upon the prosecution’s motive for the delay: A delay intended to hinder the defense will weigh heavily in favor of finding a speedy-trial violation; a delay from mere negligence will weigh slightly in favor of finding a speedy-trial violation; and a delay intended to aid the truth-seeking function of a trial (like finding a witness) will not weigh in favor of finding a violation. *Id.* at 531; *Brillon*, 556 U.S. at 90.

Though courts routinely state that none of these factors, alone, are determinative, it remains the case that a defendant cannot prevail on a

speedy trial claim if he caused the delay. *See, e.g., Wade v. State*, 83 S.W.3d 835, 839 (Tex. App.—Texarkana 2002, no pet.) (no speedy-trial violation where more than five years of delay caused by defendant).

**B. The Interstate Agreement on Detainers Act provides incarcerated defendants with an absolute right to force a trial on any pending out-of-state indictments.**

Both Texas and Nebraska have passed into law the Interstate Agreement on Detainers Act (IADA). *See* TEX. CODE CRIM. PROC. art. 51.14; NEB. REV. STAT. ANN. § 29-759 (Westlaw through 2015). Under this agreement, when charges are brought in one state against a defendant who is serving a term of imprisonment in another state, the charging state may file a detainer on the inmate. That detainer provides the inmate with notice of the charges against him, and with notice that he has the right to demand to be sent to the charging state to stand trial. TEX. CODE CRIM. PROC. art. 51.14 art. III. If the inmate makes such a demand, the warden of his prison must send the request to the charging state, and the charging state must bring the inmate to trial within 180 days of receiving the demand, or else the charges must be dismissed. *Ibid*; *see Gibson v. Klevenhagen*, 777 F.2d 1056, 1058 (5th Cir. 1985).

The IADA allows the state that filed the detainer to demand the inmate's extradition to stand trial. *Id.* at art. IV. When such a demand is filed,

once the inmate clears extradition and arrives in the charging state he must be brought to trial within 120 days. *Ibid.*

Whether it is the inmate or the charging state who exercises their trial option, once the prosecution in the charging state has concluded the inmate must be returned to the sending state “[a]t the earliest practicable time” to resume serving his original sentence. *Id.* at art. V(e).

## **II. The Fourteenth Court’s Opinion**

### **A. The State argued that the delay in this case should not count against the State because the delay was caused equally by the State’s and the appellant’s failure to request a trial when both had equal power to do so.**

On appeal, the State presented this case as a question of whether the right to a speedy trial was an individual right that a defendant may exercise at his discretion, or an immutable obligation on the part of prosecutors to force defendants to have speedy trials whether they want them or not. (State’s Appellate Brief at 10). The State pointed out that it was unaware of any authority for the proposition that the prosecution must force defendants to have speedy trials even if they do not want them. (State’s Appellate Brief at 13). Imposing such a duty on the prosecution is not only inconsistent with the traditional notion of a “right,” it is also inconsistent with *Barker’s* concern for defendants

gaming the system by going along with delays and then requesting dismissals on speedy-trial grounds.

The State argued that the impact of the IADA made this case different from normal speedy-trial cases. Unlike a normal defendant who has no power to force a speedy trial, a defendant against whom a detainer has been filed has the ability to demand a trial and if he is not given one in 180 days the charges must be dismissed. *See, e.g., State v. Chesnut*, 424 S.W.3d 213, 218 (Tex. App.—Texarkana 2014, no pet.) (affirming trial court’s dismissal of charges due to failure to try IADA defendant within 180 days of request). The State found no authority from Texas courts dealing with the effect of the IADA on the Sixth Amendment speedy-trial right, but in its brief the State discussed authority from two state high courts and a federal circuit court indicating that once a detainer has been filed, the IADA defendant’s unique ability to demand a trial means that any time during which he does not request a trial is not attributable to the prosecution for purposes of *Barker*.

In *Windham v. State*, 43 P.3d 993 (Nev. 2002) the defendant committed an offense in Nevada and almost immediately went to California where he committed another offense and was incarcerated.

*Windham*, 43 P.3d at 994. While Windham was in a California prison, Nevada filed a detainer on him but did not exercise its option for a trial. Windham seems to have filed a request for trial under the IADA, but his request was insufficient to alert the prosecution to his desire for a trial. *Id.* at 996-97. Eventually the State exercised its option and Windham was convicted. The Nevada Supreme Court, on its way to holding that Windham's right to a speedy trial was not violated, attributed the period of Windham's California incarceration (during which time a detainer was filed but neither party effectively exercised its option to force a trial) to Windham, not the prosecution.

*Jenkins v. Purkett*, 963 F.2d 1117 (8th Cir. 1992), *cert. denied*, 506 U.S. 915 (1992) involved a federal habeas petitioner's claim that the Missouri state courts had violated his right to a speedy trial. Jenkins was charged in 1978, but he did not appear at his original trial setting. He then went to California where he committed an offense and was imprisoned. *Jenkins*, 963 F.2d at 1117. Missouri filed a detainer on him, and Jenkins requested a trial but the request was never conveyed to the prosecutor (due to reasons that were not the prosecutor's fault). When the prosecutor finally learned about the request in 1988, the prosecutor immediately exercised his option under the IADA to force a trial, but

Jenkins raised a speedy-trial claim; it was denied, Jenkins was convicted, and he eventually moved for federal habeas relief on a speedy-trial claim. As part of its holding that the delay did not violate the Sixth Amendment, the Eighth Circuit did not attribute the delay to the prosecution: “[T]here was good reason for the delay because of the prosecutor’s lack of timely notice [of Jenkins’s request for trial].” *Id.* at 1118. The Eighth Circuit made no mention of the obvious fact that the prosecutor could have demanded a trial.

In *State v. Goodroad*, 521 N.W.2d 433 (S.D. 1994), the defendant was indicted in Butte County, South Dakota in September 1990, but then went to Minnesota where he was arrested the next month on other charges. *Goodroad*, 521 N.W.2d at 434. The Butte County prosecutor seems to have filed a detainer on Goodroad the week after his arrest. *Id.* at 438. It seems that in May 1992, Goodroad was extradited to a different county in South Dakota to stand trial for other charges. *Id.* at 434-35. Eventually Goodroad stood trial in Butte County in 1993, and when he did he claimed that his right to a speedy trial had been violated. The trial court granted the motion to dismiss on this basis, but the South Dakota Supreme Court reversed. In conducting a *de novo* review of the *Barker* factors, for the second factor the court attributed the entire delay

to Goodroad: “The reason for the twenty-month delay from indictment until extradition from Minnesota is attributable either to Goodroad’s flight from this jurisdiction to avoid prosecution or his failure to demand disposition of the charges against him.” *Id.* at 439. The court did not mention the obvious fact that the Butte County prosecutor could have exercised his option to force extradition but did not do so.

**B. The Fourteenth Court did not address the State’s argument other than to declare it “incorrect.” The Fourteenth Court then relied on *Dragoo*, a case with no connection to the IADA, as a basis for holding that the IADA was not relevant to the second *Barker* factor.**

The Fourteenth Court declared the State’s argument “incorrect,” and held, effectively, that the IADA in no way altered the analysis for the second *Barker* factor. *Hopper*, 495 S.W.3d at 475. The Fourteenth Court held that the State’s argument was “at odds with the decisions from the Supreme Court, which hold not only that the defendant ‘has no duty to bring himself to trial,’ but that, quite the opposite, this ‘primary burden’ rests firmly with the State.” *Ibid.* (quoting *Barker*, 407 U.S. at 527).

The Fourteenth Court then stated that the State’s position was “inconsistent with the jurisprudence of the Court of Criminal Appeals.” *Ibid.* The Fourteenth Court discussed *Dragoo v. State*, 96 S.W.3d 308

(Tex. Crim. App. 2003), which it found to be controlling. Dragoo had already been convicted of one offense and was in a Texas prison during the pendency of the relevant charge, thus, in the Fourteenth Court's language, "the State had no reason to file a detainer under the IAD[A]."<sup>2</sup> *Hopper*, 495 S.W.3d at 475. According to the Fourteenth Court, *Dragoo* was similar to the appellant's case because the defendant was aware of the pending charges and did not request a trial. *Ibid*.

The facts of appellant's case are not more favorable to the State simply because the State filed a detainer. In both this case and *Dragoo*, the defendant was aware of the pending charge, and the State was aware of the defendant's exact location. Also in both cases, the defendant could have demanded a speedy trial, by virtue of his knowledge of the pending charge, and the State could have compelled the defendant's presence for trial, by virtue of his status as a prisoner.

*Ibid*. The Fourteenth Court saw "no reason why [its] analysis should depart from *Dragoo*," and, in accord with *Dragoo*, held that the State was responsible for the delay here.

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<sup>2</sup> The State does not believe the *Interstate* Agreement on Detainers Act has any application to an *intrastate* transfer. See *State v. Julian*, 765 P.2d 1104, 1106 (Kan. 1988) ("The Interstate Agreement on Detainers has interstate rather than intrastate application.")

### III. Cases Addressing the State's Question.

#### A. The State's issue is a matter of first impression in Texas. Non-Texas courts are split on the subject, but none seems to have given it serious analysis.

The most notable part of the Fourteenth Court's explanation is the lack thereof. Presented with a question of first impression in Texas, and authorities showing that at least some non-Texas courts believed the IADA had an impact on the *Barker* analysis, the Fourteenth Court ignored those authorities and declared the State's argument "incorrect."<sup>3</sup> The Fourteenth Court analyzed this case using *Dragoo*, a case that had no connection to the IADA, and treated this case like a run-of-the mill speedy trial claim.

While the Fourteenth Court's lack of analysis renders its opinion unhelpful for advancing the jurisprudence of the state, that court's perfunctory handling of the matter is in line with how the question has been addressed elsewhere. The State has now found published cases from eight states and a federal circuit that address the question the State

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<sup>3</sup> The Fourteenth Court stated that "[t]he State's position is at odds with the decisions from the Supreme Court," and then cited to *Barker* and *Doggett*. The Nevada and South Dakota cases cited by the State post-dated *Barker* and *Doggett* and cited to both; the Eighth Circuit case cited by the State pre-dated *Doggett* but cited to *Barker* several times. Obviously those courts did not believe their position was at odds with the decisions from the Supreme Court.

has presented here;<sup>4</sup> four states and a federal circuit agree with the State's position, while four states agree with the Fourteenth Court. Unfortunately, none of these cases provide detailed analysis. Indeed, all of them assume the correctness of their position without addressing the possibility of alternative views.

**B. The State's position is the rule in five jurisdictions.**

The State's position is that once a prosecutor files a detainer on a defendant who is incarcerated in another state and informs the defendant of his right to demand a trial under the IADA, any delay between that notification and the time when one side actually uses the IADA to force a trial is caused equally by the prosecutor and the defendant and, accordingly, should not count against the prosecutor if the defendant eventually files a speedy trial claim. This position is also taken by the Eight Circuit and the supreme courts of Nevada, South Dakota, Montana, and Indiana.

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<sup>4</sup> At the time the State submitted its brief to the Fourteenth Court and its cross-PDR to this Court, the State's appellate counsel had found only three non-Texas cases, namely the Nevada, South Dakota, and Eighth Circuit cases discussed above. Since then the State has discovered additional non-Texas cases. The State made no claim then and makes no claim now that its list of non-Texas authorities is exhaustive; it claims only that its list is the product of extensive research.

The cases from the Eight Circuit, Nevada, and South Dakota, discussed above in [Section II.A.](#), did not explicitly state a rule, but the rule can be inferred. *See Jenkins*, 963 F.2d at 1118; *Windham*, 43 P.3d at 996-97; *Goodroad*, 521 N.W.2d at 439. The Montana and Indiana Supreme Courts have adopted explicit rules.

In *Crawford v. State*, 669 N.E.2d 141 (Ind. 1996), the defendant was in a Missouri prison when murder charges were filed against him in Indiana in June, 1990; Indiana filed a detainer with Missouri officials the same month. *Crawford*, 669 N.E.2d at 145. Crawford filed a motion to dismiss in January, 1992, but he did not request final disposition through the IADA until May, 1993. *Ibid.* Crawford went to trial in February 1994, and, ultimately appealed the denial of his motion to dismiss for lack of a speedy trial. *Ibid.* In assessing the reasons for the delay, the Indiana Supreme Court held that, after prosecutors filed the detainer “[i]t was incumbent on [Crawford]” to request disposition. *Id.* at 146. Accordingly, during the time period between the filing of the detainer and the request for final disposition, Crawford “waived any right to assert delay in the disposition of his case by electing not to invoke his rights under the [IADA].” *Ibid.* The Indiana Supreme Court

weighed the entire period of delay against Crawford and in favor of the prosecution. *Ibid.*

In *State v. Grant*, 738 P.2d 106 (Mont. 1987), the defendant left was facing some theft charges in Montana, but during a two-month gap between pre-trial hearings he went to Idaho, committed a burglary, and got a five-year prison sentence in that state. *Grant*, 738 P.2d at 107. The first hearing at which the Montana prosecutors noted Grant's absence was January 11, 1985. *Ibid.* When they learned that he was in an Idaho penitentiary, Montana authorities issued a detainer on January 22. *Id.* at 107-08. The Montana authorities issued two other detainers over the next few months, but Grant did not request a final disposition of his charges under the IADA until June 19. *Id.* at 108. When he went to trial in October, Grant filed a motion to dismiss based on a violation of his right to a speedy trial; that motion was denied and he appealed. *Ibid.* In evaluating the reasons for the various periods of delay in the case, the Montana Supreme Court held that the period between the filing of the first detainer and Grant's request for disposition was "chargeable to [Grant]," not the prosecution. *Id.* at 109. "Knowing that charges were pending against him in Montana, it was up to [Grant] to request speedy and final disposition of the charges against him." *Ibid.* The Montana

Supreme Court has followed this rule in at least one subsequent case. *See State v. Stewart*, 881 P.2d 629, 633 (Mont. 1994) (weighing time after detainer was filed against defendant: “Defendant was aware of the charges pending in Montana and of his right to request a final disposition of those charges under Article III of the [IADA]. Defendant did not exercise that right.”).

**C. The Fourteenth Court’s position is the rule in four jurisdictions.**

The Fourteenth Court’s holding was that the existence of an IADA detainer does not alter the analysis for the second *Barker* factor. The State has found published cases from four states — the high courts of Maryland and Maine, and intermediate courts in Michigan and Washington — that are consistent with the Fourteenth Court’s holding.

In *People v. Rodriguez*, 209 N.W.2d 441 (Mich. App. 1973), the defendant committed a robbery in Michigan in November 1965, but by June of the next year he had gone to California and been convicted and sentenced for drug possession. *Rodriguez*, 209 N.W.2d at 552. The Michigan authorities promptly lodged a detainer with California authorities, but no action was taken on the detainer until Rodriguez was paroled in January 1972. *Id.* at 442-43. When Michigan trial proceedings

began, he moved for a dismissal based on the violation of his right to a speedy trial. The trial court denied the motion. *Id.* at 443.

On appeal, the prosecution argued that, for purposes of the second *Barker* factor, the time period after the detainer was filed should be weighed against Rodriguez because under the IADA he could have requested a trial. *Id.* at 444. The Michigan Court of Appeals rejected this argument with a single sentence: “[W]e do not perceive the [IADA] as being the sole codification of an accused’s rights to a speedy trial when he is imprisoned on another charge in a foreign jurisdiction.” *Ibid.* The court then weighed the time against the prosecution and, in light of the harm it believed Rodriguez had suffered, set aside the conviction. *Ibid.*

The longest treatment of the question presented comes from Maryland. In *State v. Wilson*, 371 A.2d 140 (Md. App. 1977), the defendant committed a burglary in Maryland in June 1971, but while awaiting trial went to Massachusetts where he was arrested for and convicted of being an accessory to manslaughter. *Wilson*, 371 A.2d at 151. During his stay in a Massachusetts penitentiary, Maryland authorities filed a detainer, but, through a series of procedural maneuvers in state and federal court, Wilson was able to avoid being

sent back to Maryland for trial until 1975<sup>5</sup>; at that point he filed a motion to dismiss due to the lack of a speedy trial, and the trial court granted it. *Id.* at 157-58. On appeal by the prosecution, the Maryland Court of Special Appeals (that state's intermediate court) held that Wilson's right to a speedy trial had not been violated and reversed the trial court. *Id.* at 161. On its way to doing so, the Court of Special Appeals blamed the delay on Wilson for not using IADA procedures to demand a trial:

The law provides an avenue for person so situated in one jurisdiction to obtain a resolution of outstanding them in another jurisdiction. That remedy is the [IADA]. The statutory provisions are more specific than the general claim under the Sixth Amendment, but the availability of the statutory remedy influences the general Sixth Amendment claim. Under the [IADA], the burden is upon the prisoner to request the benefits of the [IADA].

*Id.* at 157.

The Maryland Court of Appeals (that state's high court) granted review of the case. *Wilson v. State*, 382 A.2d 1053 (Md. 1978). Though that court affirmed the intermediate court's judgement and made no explicit mention of a disagreement, in assessing the cause of the delay it

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<sup>5</sup> At least part of the delay seems to have been caused by the fact that Wilson was tried twice — with both cases resulting in a hung jury — for the prison murder of Albert DeSalvo, AKA the Boston Stranger. *See Wilson*, 371 A.2d at 151.

reached the completely opposite conclusion from the intermediate court. Near the beginning of the opinion, the court quoted the familiar line from *Barker* that a “defendant has no duty to bring himself to trial; the State has that duty.” *Id.* at 1055 (quoting *Barker v. Wingo*, 407 U.S. 514, 527 (1972)). From this, the court extrapolated, “that the State may not excuse delay in bringing an accused to trial merely because he is incarcerated for other offenses in this or other jurisdiction.” *Ibid.* Later in the opinion, after noting that Wilson had not used the IADA procedures available to him to request a trial, the court commented, without citation, “This, of course, did not relieve the State of its duty which it has, independent of the Act, to bring Wilson to trial.” Ultimately, though the court weighed the delay against the prosecution, the Maryland Court of Appeals held that the *Barker* factors weighed in favor of finding that Wilson’s right to a speedy trial was not violated. *Id.* at 1068.

The Washington Court of Appeals has two cases somewhat on point. In *State v. Newcomer*, 737 P.2d 1285 (Wash. App. 1987), a Washington defendant was charged with robbery in Washington but then became incarcerated in Oregon. *Newcomer*, 737 P.2d 1286-87. The prosecutor filed a detainer, but no effort was made to bring Newcomer

to trial in Washington until after he finished his Oregon sentence four years later. *Id.* at 1287. In discussing whether his right to a speedy trial had been violated, the Washington Court of Appeals stated that “the Supreme Court has required that states make a diligent good faith effort to bring [defendants incarcerated in other states] back for trial.” *Ibid.* (citing *Dickey v. Florida*, 390 U.S. 30 (1970) and *Smith v. Hooey*, 393 U.S. 374 (1969)). The court noted that “[s]tates usually accomplish this through adoption and utilization of interstate detainer compacts.” *Ibid.* The court continued, though, that while the IADA placed no obligation on the prosecution to bring defendant to trial after a detainer had been placed, “the minimal requirements of the [IADA] provisions do not relieve the State of its Sixth Amendment responsibilities.” *Id.* at 1288 (citing *Hooey*<sup>6</sup>; *Rodriguez*; *Unites States v. Dowl*, 394 F.Supp. 1250 (D.Minn 1975); and *State v. Dean*, 399 A.2d 1367 (Md. App. 1979) (a case that discussed *Wilson*)). The court then weighed the delay against the prosecution, but concluded the totality of the *Barker* factors weighed against a finding of a speedy trial violation. *Id.* at 1290.

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<sup>6</sup> The use of *Hooey* to support this proposition is questionable, as that case involved a federal inmate attempting to use pre-IADA common law procedures to force a trial on a Texas charge. *See Hooey*, 393 U.S. at 375.

One fact in *Newcomer* renders it distinguishable for purposes of this case. While the record there showed that the Washington prosecutors filed a detainer, there was no indication the Oregon authorities informed Newcomer of his right to demand final disposition under the IADA. *Id.* at 1289. However, six years later the Washington Court of Appeals applied the rule from *Newcomer* to a case where the defendant had been made aware of his right to demand a trial, thus it seems that the lack of notice was not relevant to the *Newcomer* court's decision. *See State v. Davis*, 849 P.2d 1283, 1285-86 (Wash. App. 1993).

In *State v. Beauchene*, 541 A.2d 914 (Me. 1988) the defendant (who had been acquitted of an earlier crime by reason of mental disease or defect) escaped from a Maine mental institution and was charged with felony escape. *Beauchene*, 541 A.2d at 915. However, his escape was so successful that he made it to New York City, where he committed and was convicted of "three serious criminal charges." *Ibid.* While Beauchene was in the New York penitentiary, the Maine prosecutors filed a detainer. *Ibid.* Beauchene filed a form indicating that he would oppose extradition, but other than that neither party acted on the detainer for six years, at which point Maine exercised its IADA Article IV

option to have him sent for a trial. *Ibid.* At his trial and on appeal, Beauchene raised a speedy-trial claim.

Related to the cause for the delay, the prosecution conceded that “a major portion of [the delay] resulted from the State’s negligence in not actively pursuing the return of defendant to Maine.” *Id.* at 918. Without noting that Beauchene had an equal ability to demand a trial under the IADA, the Maine Supreme Court weighed the time during the pendency of the detainer against the prosecution. *Ibid.* However, as part of the third *Barker* factor — the defendant’s invocation of his right to a speedy trial — the court held that Beauchene’s “failure to assert his own available rights under the [IADA] to get a prompt trial ... militate[s] against any conclusion that a constitutional violation has occurred.” *Id.* at 919. Accordingly, the court affirmed the conviction. *Ibid.*

#### **IV. Argument**

##### **A. The general principle that the State has the “primary burden” of bringing a defendant to trial did not resolve the issue in this case.**

The Fourteenth Court rejected the State’s argument based on language from the Supreme Court indicating that a defendant has “no duty to bring himself to trial,” but, instead, the “‘primary burden’ [for

bringing the defendant to trial] rests firmly with the State.” *Hopper*, 495 S.W.3d at 475. As a statement of a general principle, this is surely correct. As a rule that decides this case, however, this is wholly insufficient.

If noting that the State had the “primary burden” was sufficient for deciding cases, there would never be a case where the delay was blamed on the defendant. For instance, in *Brillon* years of delay were caused by defense counsel’s “inability or unwillingness ... to move the case forward.” *Vermont v. Brillon*, 556 U.S. 81, 92-93 (2009). If noting that the prosecution had the “primary burden” of ensuring a speedy trial were sufficient as a basis to decide cases, the Supreme Court would have weighed *Brillon*’s delay against the prosecution. It did not.

The question here, as in any speedy trial case, is not whether the State has the primary burden of bringing the defendant to trial, but whether the State’s actions or inaction hindered the defendant’s Sixth Amendment rights. The Fourteenth Court failed to meaningfully analyze this question.

**B. A defendant against whom a detainer has been lodged is, in terms of his ability to have a speedy trial, in a fundamentally different position from any other defendant.**

The remarkable part about an IADA situation is that, once the detainer is filed, the prosecution and the defendant are in virtually identical situations in terms of being able to force a trial. If anything, comparing Articles III and IV of the IADA shows that it takes much less effort and paperwork for a defendant to request a trial than for the State. None of the seminal speedy trial cases from this Court or the federal Supreme Court deal with situations where defendants had such control over the proceedings.

The Fourteenth Court relied on *Dragoo*, a case involving a Texas prosecutor bringing criminal charges against an inmate in a Texas prison. This case would be analogous to *Dragoo*'s purely intrastate situation had the State not filed a detainer but instead had gone through the pre-IADA extradition process.<sup>7</sup> In that situation, like *Dragoo*, the

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<sup>7</sup> Pre-IADA cases illustrate the difficulty out-of-state prisoners had in forcing trials. In *Dickey v. Florida*, 398 U.S. 30 (1970), for instance, a federal prisoner spent five years attempting to force a Florida prosecutor to bring him to trial on pending charges. He did so by repeatedly filing "a petition styled 'writ of habeas corpus ad prosequendum'" in the district court. *Dickey*, 398 U.S. at 32. When that was denied four times, Dickey petitioned the state supreme court for mandamus relief, which was denied on technical grounds — he had named the wrong respondent. Only then did the prosecutor take action to secure Dickey's presence.

appellant's ability to request a speedy trial would have been limited to invoking his Sixth Amendment right in a motion, the same as a typical defendant. The IADA, by giving defendants an immediately enforceable tool to force a trial at the time of their choosing, gives defendants significant control over whether they have a speedy trial. This level of control was not available to Dragoo.

**C. The level of control matters for purposes of *Barker's* second factor because speedy-trial law is concerned about gamesmanship.**

The reason that the defendant's level of control over the proceedings should alter the speedy-trial analysis is very simple: Gamesmanship. From *Barker* on, speedy-trial cases have been concerned with protecting defendants' rights while preventing defendants from gaming the system and gaining unjust dismissals. Because Dragoo had no control over when he went to trial, his ability to game the system was limited. Because the appellant could have gone to trial at the time of his choosing, his ability to game the system was considerable. For instance, had the defendant found out that the complaining witness had died, he could have immediately demanded a trial and almost surely had this charge dismissed. Or he could have

waited until his own witness died, filed a motion for speedy trial, and had that witness's death count as harm for the fourth *Barker* factor. Dragoo was not in a position to play that wait-and-see game.

In *Barker's* discussion of its second factor, the Supreme Court made clear that gamesmanship and control were concerns in accessing the cause of delay. When delay is attributable to the prosecution, *Barker* commands that courts look at the intent behind the delay: If the intent was to hamper the defense, that would "be weighted heavily"; if the intent were to ensure a more accurate trial (such as delay due to a missing witness), the delay could be completely justified; and if the prosecution had no actual intent to delay the trial but the trial was delayed due to "[a] more neutral reason such as negligence or overcrowded courts," the delay would weigh against the prosecution, but "less heavily" than a delay caused with the intent to hamper the defense. *Barker*, 407 U.S. at 531. This focus on intent is a recognition that when a party has control over when a case goes to trial, it is the role of the court to prevent that party from gaining an unfair advantage.

By attributing the delay in an IADA case to the State, the Fourteenth Court failed to recognize the degree of control an IADA defendant has over when he goes to trial, and the opportunities this

control presents for gaming the system. The reason the Fourteenth Court ultimately affirmed the trial court in this case was that the appellant made no credible claim of harm. *Hopper*, 495 S.W.3d at 481-82. However, because of the length of the delay in this case that the Fourteenth Court weighed against the State, it would not have taken much harm to have prompted a reversal. *See Cantu v. State*, 253 SW.3d 271, 281 (Tex. Crim. App. 2008) (explaining that as the length of the delay increases, the amount of harm a defendant must show to win a dismissal decreases). Had the defendant been able to point to a defense witness who died during the delay, or had he been able to point to *any* favorable evidence that went missing, no matter how slight, in a case where 18 years of delay is being weighed against the State, that would have been enough to require dismissal. *See Dragoo*, 96 S.W.3d at 315 (noting that harm to the defendant's ability to present a defense is the most serious type of harm in a *Barker* analysis).

In an IADA situation, where both sides know of the pending charges and have the exact same ability to force a trial, it is inaccurate to say that one side or the other is more responsible for the delay. . *See, e.g., Lopez v. State*, 478 S.W.3d 936, 943 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (delay from agreed resets is not attributed to the State

for purposes of second *Barker* factor). Because the right to a speedy trial is a right that belongs to the defendant personally, this Court should hold that once a defendant learns of a detainer and chooses not to have a speedy trial, the delay between that point and any subsequent demand for a trial does not count against the State for purposes of a speedy trial analysis

**D. By offering a defendant a trial at the time of his choosing, the State satisfies its burden under the Sixth Amendment.**

The Fourteenth Court expressed the view that filing an IADA detainer did not fulfill the State's duty of providing a speedy trial. *Hopper*, 495 S.W.3d at 475. A couple of the non-Texas courts that share the Fourteenth Court's view seem to believe that treating the IADA as the mechanism for giving defendants access to speedy trials would somehow undermine the importance of the Sixth Amendment. *See Rodriguez*, 209 S.W.2d at 444 (“[W]e do not perceive the [IADA] as being the sole codification of an accused's rights to a speedy trial when he is imprisoned on another charge in a foreign jurisdiction.”); *Wilson*, 328 A.2d at 1064 (notifying the defendant of his rights under the IADA “of

course, did not relieve the State of its duty which it has, independent of the Act, to bring Wilson to trial.”).

But that is not the case; rather, the IADA reinforces a defendant’s Sixth Amendment protections. By filing a detainer and informing the appellant of the IADA procedures he could go through to obtain a trial within 180 days, the State gave this appellant more power to exercise his right to a speedy trial than most Texas defendants have. Since this Court overruled Texas’s Speedy Trial Act, the only mechanism by which an in-state defendant can obtain a speedy trial is by filing a *Barker*-based motion for speedy trial, but such a motion does not even trigger judicial review until the delay has reached a year (and the chances of gaining a dismissal are very low until the delay is much longer than that). An IADA defendant, on the other hand, has a right to a dismissal if the trial does not happen within 180 days.

The Sixth Amendment right to a speedy trial is, like the other rights of the first eight amendments, a personal right. *See Johnson v. State*, 954 S.W.2d 770, 772 (Tex. Crim. App. 1997) (overruling court of appeals decision that had recognized a “community right” to a speedy trial). As *Barker* emphasized, the objective of a speedy-trial analysis is not to look at a clock and determine whether it has counted down to

dismissal at a certain, arbitrary, point in time, nor is it to reprimand prosecutors for letting cases slip through the cracks. The point of a speedy trial analysis is to determine whether a defendant's right to a speedy trial has been violated.

In answering that question, it approaches the level of farce to give a defendant in the appellant's shoes the benefit of the time he has spent demonstrably *not* wanting a speedy trial. Accordingly, this Court should join with the Eighth Circuit as well as the Supreme Courts of Montana, Nevada, South Dakota and Indiana and hold that once a defendant is made aware of the charges against him and advised of his rights under the IADA to force a speedy trial, any time in which he does not do so does not accrue to his benefit for purposes of *Barker's* second factor. The contrary holding encourages gamesmanship and rewards defendants for sitting on their rights.

## **Conclusion**

The State asks this Court to correct the Fourteenth Court's holding regarding the second *Barker* factor, but to otherwise affirm the judgment of that court. .

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